(3) the magistrate should indicate whether the sentences were to run concurrently or not.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Idris (Inspector of Police) for the Public Prosecutor.

Lee Hun Hoe J.C.: This is an appeal against sentence. Appellant was charged with two offences under sections 21(c) and 21(e) of the Forests Ordinance. Both offences were punishable under section 79 of the said Ordinance.

I dismissed the appeal and stated that I would give my reason in writing. This I now do. The offences committed are serious. I am of the opinion that the sentence of 4 weeks was appropriate in view of the large number of trees cut down in an area reserved for research.

Appellant was convicted on the two charges on his own plea. But the learned magistrate did not pass separate sentence on each charge but merely stated that he sentenced appellant to 4 weeks' imprisonment. This is incorrect. It is most important that a separate sentence be passed on each conviction. The magistrate should then indicate whether the sentences were to run concurrently or not. Magistrates must realise that if separate sentences were not passed this court would be faced with difficulty if the appellant successfully appealed against one of the charges.

Another matter should be mentioned. That is where an offence under the Forest Ordinance is punishable under section 79 of the said Ordinance it is advisable to bring the charge before a District Court as it is more likely than not that the pecuniary penalty may exceed the jurisdiction of the Police Court because of the provisions "or ten times the value (as estimated by the Conservator or a person authorised by him in that behalf) of the forest produce in respect of which the offence has been committed, whichever is the greater."

I would therefore revise the sentence. Appellant is sentenced to 4 weeks' imprisonment on each charge. Sentences to run concurrently. Subject to this revision the appeal against sentence was dismissed.

Appeal dismissed.

KONG NYAT MOI v. LEONG SING CHIANG

[O.C.J. (Lee Hun Hoe J.C.) October 28, 1964]

[Sibu — Matrimonial Case No. M/29/64]

Husband and Wife — Divorce — Chinese Customary law — Kheh customary rules — Divorce by consent — Cruelty — Divorce will not be granted as a matter of course.

In this case the petitioner (wife) applied for divorce, alleging cruelty, desertion and failure to maintain. The respondent opposed divorce and denied all the allegations and stated that he wanted the wife to return to him. The evidence established it was the custom among the Kheh community that if both parties agreed to mutual divorce it might be granted.

Held: the petitioner had failed to satisfy the court that she was entitled to divorce on good grounds according to the customary law of her community and therefore the petition must be dismissed.

Cases referred to:—

(1) *Lo Siew Ying* v. *Chong Fay* [1959] S.C.R. 1.

(2) *Thia Whee Kiang* v. *Kueh Eng Seng* [1955] S.C.R. 75.

DIVORCE PETITION.

Parties in person.

Lee Hun Hoe J.C.: The parties were married in 1961 according to Chinese custom at Kanowit. The marriage was registered under the provisions of the Chinese Marriage Ordinance. Both parties belong to the Kheh community. At the time of the marriage the wife was 20 years of age and the husband was a year younger. After the marriage they lived with the respondent's parents. They have no children. Respondent's two married brothers also lived there.

In the petition for divorce she alleged cruelty, desertion and failure to maintain. Respondent opposed divorce and in his answer denied all the allegations. In fact he still wants his wife to return to him.

The court does not grant divorce as a matter of course. The court will only do so if the petitioner can satisfy the court that she can bring her petition within the customary law of the community to which they belong. That is the Kheh or Hakka community.

Unfortunately most of the witnesses were unable to assist the court concerning the Kheh customary rules for divorce. They could only say that if both parties agreed to mutual divorce it might be granted. But here respondent opposed divorce.

Petitioner alleged that some eight months after the marriage respondent beat her up and ordered her to leave the matrimonial house. She further alleged that respondent gave her no money when she was sick and that he refused to take her to see any doctor. She said that some time in the middle of 1962 respondent told her to leave the matrimonial home and so she came to Sibu. Since then she remained in Sibu.

Respondent admitted slapping her once during a quarrel. He stated that he had taken her to see different Chinese druggists when she was sick. Also he had brought her to the Christ Hospital, Kapit to see a doctor. He produced various prescriptions and receipts and one out-patient card to support his statement.

It would appear that at the beginning of their marriage the parties had meals together with respondent's parents and other members of the family. But later, on petitioner's complaint to respondent, arrangement was made for them to have separate meals by themselves. In the middle of 1962 petitioner wanted to go to Sibu and asked respondent for permission but he refused to give her permission to do so. Nevertheless, she went to Sibu. Later respondent with the assistance of Kong Siau Chai (P.W.3) the area sub-headman found petitioner in Sibu. P.W.3 succeeded in persuading her to return home. But it became clear she could not get on well with the other members of the respondent's family. Respondent asked her not to quarrel with the other members of the family. She did not heed respondent's advice. She wanted to leave the house. Eventually respondent agreed to leave. They left for Sibu and looked for jobs. They decided to leave the house partly because the family arrangement made by Leong Miaw Kin (P.W.2) in respect of the rubber tapped, for respondent and his two other brothers had not proved satisfactory to petitioner. Respondent found a job and petitioner also found a job. Since then she had moved from job to job. All these time respondent visited her at the various places she worked. He persuaded her to stay with him as he had rented a room at Yu Teck Road. But she refused to join him. She did not even tell him when she changed her job and moved to another place. Later she appeared cool and indifferent towards him.

Petitioner called three witnesses. In my view they do not support her story. I have no doubt that all the witnesses both for petitioner and respondent were truthful and sincere witnesses. In fact I would say that evidence of petitioner's witnesses tend to support respondent rather than petitioner.

From my observation of their demeanour in court I form the impression that petitioner is a person with a will of her own and does not readily respect other person's opinion. I also form the impression that she will take offence easily and will readily quarrel. Also she appears more mature in outlook than respondent. On the other hand respondent was compelled to choose between his respect for his parents and others and his love for petitioner. In the end he chose petitioner and accompanied her to Sibu to start a home of their own.

But petitioner would have me believe that respondent came to Sibu first and that she followed him later and looked him up and he refused to have her. I find her to give way to exaggeration easily where it served her purpose. Respondent appears to me to be a sincere and honest witness. Between petitioner and respondent I have no hesitation in accepting respondent's evidence as being more reliable.

Cruelty is not defined anywhere by our law. The legal conception of cruelty is generally described as conduct of such a character as to have caused danger to life, limb or health (bodily or mentally) or as to give rise to a reasonable apprehension of such danger. In my view in this case cruelty has not been made out.

Respondent has been trying hard to get petitioner to live with him since they both came to Sibu after leaving Kanowit. He is even now ready and willing to receive her. Yet she said respondent deserted her. She gave no reason why she refused to live with respondent who had done everything to accomodate her wishes. I rather think it was the petitioner who is deserting respondent. She seems to have the intention of abandoning the matrimonial consortium.

I have no doubt that while the parties were living with respondent's family petitioner was properly looked after. Perhaps she did not have as much money as she would like from respondent. But that does not constitute a ground for non-maintenance. Most young people nowadays would prefer to have their own place. The difficulties of living with in-laws are proverbial. Respondent has done his best to make a home for them.

Petitioner made it quite clear that she started this action when she learned that respondent had applied for a passport to return to China. Respondent did not deny that he had applied for a passport to return to China. But he said he had no intention of returning to China. His purpose was to see the reaction of petitioner when she learned of his application.

In *Lo Siew Ying* v. *Chong Fay* [1] Briggs J. in the course of his judgment referred at page 3 to the expert evidence:—

> "In his evidence Mr. Kong said it would be within modern Hakka custom to grant a divorce to a wife who has left her husband on her own free will where he had failed to get her back provided the separation may be considered to be final: i.e. where there is possibly no reconciliation. If there were a reason for the wife leaving him it would strengthen her case in her favour. One important factor is whether the husband can support the wife? If the husband cannot support the children adequately and provide them with suitable education then the wife is justified in asking for a divorce from her husband.
>
> He then went so far as to state that if the parties were incompatible the wife would get a divorce even if the husband refused to agree."

In order for the petitioner to succeed there must be acceptable evidence. Thus in *Thia Whee Kiang* v. *Kueh Eng Seng* [2] in the Court of Appeal, Williams C.J. said:—

"In granting a decree of dissolution of marriage in this case the learned trial Judge stated: 'There is no possibility of a reconciliation and that to my mind is enough for a dissolution.' That may have been a common-sense view but, with respect, I do not think that it was a proper conclusion to reach in the circumstances of this case."

After summarising the facts he continued at page 76 in these words:—

"It would appear that the learned Judge was of the opinion that, because the husband did not want his wife back and because the wife stated that she did not want to return to her husband, this was in effect a prayer for divorce by mutual consent. Such a divorce is in conformity with Chinese custom but here the wife stated categorically that she did want to be divorced. Her case was that the husband had made life so unbearable for her that she could no longer live with him. In my opinion, a married woman should not be deprived of her status as a wife except on good grounds supported by acceptable evidence."

In this case the petitioner has not satisfied me that there was any reason for her to refuse to live with respondent and that he was in no position to maintain her within the limit of his means. Also there was no evidence to show that they were in anyway incompatible. I am not prepared to deprive the respondent of his status as petitioner has failed to satisfy me that she is entitled to divorce on good grounds supported by acceptable evidence.

For reasons given I would dismiss the petition.

It may well be that respondent himself has good grounds for a divorce but he does not want a divorce. He has not cross-petitioned. They are still young. They must realise that in marriage there must be give and take. They should seriously consider a reconciliation to save the marriage. Perhaps influential members of their families or community will be able to help bring about a reconciliation. I make no order as to costs.

Petition dismissed.

PUBLIC PROSECUTOR v. BASAR

[A.Cr.J. (Gill J.) October 28, 1964]

[Ipoh — Criminal Appeal No. 66 of 1964]

Evidence — Identification of accused — Accused known to complainant — Recognition by flashes of lightening — Evidence not contradicted — Duty of magistrate.

Penal Code, s. 354 — Using criminal force — Intention to outrage modesty.

This was an appeal by the Public Prosecutor against the acquittal of the respondent at the end of the prosecution case on a charge of using criminal force on the complainant with the intention of outraging her modesty, an offence punishable under section 354 of the Penal Code. The complainant, who had known the respondent for some time had recognised his face by the flashes of lightning when the alleged offence was committed. Notwithstanding all the evidence for the prosecution, which was not contradicted by other evidence and remained unshaken by cross-examination, the magistrate acquitted the respondent on the ground that the complainant's evidence could not be relied on in so far as identification alone was concerned.

Held: in this case there was nothing inherently improbable about the complainant's story, and her evidence was neither contradicted by other evidence nor shaken by cross-examination. In the circumstances it was the duty of the magistrate to have called on the defence.

Case referred to:—

(1) *Public Prosecutor* v. *Mohamed Ali* [1962] M.L.J. 257, 258.

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Daim bin Haji Mohd. Zainuddin (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Gill J.: This was an appeal by the Public Prosecutor against a decision of the magistrate, Teluk Anson, acquitting the respondent at the end of the case for the prosecution on a charge of using criminal force on one Siti Hafsah binti Haji Ilias with the intention of outraging her modesty, thereby committing an offence punishable under section 354 of the Penal Code.

The evidence of Siti Hafsah (P.W.1) was that on the evening of the 17th September 1963 at about 8 p.m. she went in a group to a fair at Sungei Sumun School about half a mile away from her house. She left the fair alone at about 11 p.m., with the other members of the group following behind her at a distance of about a quarter of a mile. As she was walking along a kampong path a person ran towards her from behind, embraced her and pulled her into a bush. She recognised this person as the respondent. She fell down when the respondent pushed her into the bush and he placed his hand on her mouth and told her not to make noise. She struggled and shouted for help, and a few minutes later, by which time the respondent had run away, Rohani binti Alias and Iswan bin Takrib came up to her. She told them what had happened and they sent her home. Her Malay baju was torn at the right shoulder during the struggle.

It was clear from the evidence that the complainant had known the respondent before that night and the scene was about 10 chains from the respondent's house. In answer to questions put to her by the court she said that she saw the accused with the help of two or three flashes of lightning. She went on to say that she was absolutely certain that it was the respondent who